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In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

WESTINGHOUSE ELECTRIC CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over this appeal under 28 U.S.C. 1252 even though the Equal Employment Opportunity Commission does not seek review of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977, 5 U.S.C. 906, is unconstitutional, but instead seeks review only of the relief ordered by the district court.

2. Whether the district court correctly held that, because the legislative veto provision in the Reorganization Act is unconstitutional, the Commission cannot exercise the authority transferred to it by Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), to enforce the Equal Pay Act of 1963, 29 U.S.C. 206(d).

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JURISDICTIONAL STATEMENT

OPINION BELOW

The judgment order of the district court (App., *infra,* 1a-2a) is unofficially reported at 33 Fair Empl. Prac. Cas. (BNA) 1232.

JURISDICTION

The order of the district court granting appellee's motion to dismiss was entered on January 5, 1984 (App., *infra,* 1a-2a). A notice of appeal to this Court was filed by the Equal Employment Opportunity Commission on January 30, 1984 (App., *infra,* 3a-4a). By order dated March 21, 1984, Justice Brennan extended the time within which to docket the appeal to and including May 29, 1984.

If this Court has jurisdiction in this case, it would be under 28 U.S.C. 1252. However, we do not believe the Court has jurisdiction under 28 U.S.C. 1252 because the Commission does not seek review of the district court's

holding that the legislative veto provision of the Reorganization Act of 1977 is unconstitutional. Thus, this appeal, like the Commission's identical appeal in *EEOC* v. *Allstate Insurance Co.*, No. 83-1021, is taken for protective purposes only. The Commission also has filed a notice of appeal to the United States Court of Appeals for the Third Circuit (No. 84-3073 (3d Cir.)) under 28 U.S.C. 1291.[1]

STATUTORY AND REORGANIZATION PLAN PROVISIONS INVOLVED

The relevant provisions of the Reorganization Act of 1977, 5 U.S.C. 901 *et seq.;* the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 *et seq.*, adding Section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d); Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(c) and 217; and Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), are set forth in the Commission's Jurisdictional Statement Appendix at 22a-30a, *EEOC* v. *Allstate Insurance Co.*, No. 83-1021.

STATEMENT

This action was filed by the Equal Employment Opportunity Commission in the United States District Court for the Western District of Pennsylvania on May 20, 1983, pursuant to Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(c) and 217. The Commission's amended complaint alleges that appellee Westinghouse Electric Corporation is violating Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. 206(d) —commonly known as the Equal Pay Act — by paying lower wages to female employees than it pays to male employees performing equal work (Comp. para. 10).

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[1]By order dated May 4, 1984, the court of appeals stayed further proceedings in the case pending this Court's action on this direct appeal.

When the Equal Pay Act was first enacted in 1963 (Pub. L. No. 88-38, 77 Stat. 56 *et seq.*), enforcement authority was vested in the Secretary of Labor, who is responsible for administering the Fair Labor Standards Act generally. See 29 U.S.C. 206(d)(3), 216(c), 217. However, responsibility for administration and enforcement of the Equal Pay Act was transferred from the Secretary of Labor to the Commission by Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), which also transferred other equal employment opportunity functions (such as enforcement of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*) to the Commission. See J.S. at 3-4, *EEOC* v. *Allstate Insurance Co.*, No. 83-1021.

On August 29, 1983, appellee moved to dismiss the Commission's enforcement action, contending that the transfer of authority to the Commission to enforce the Equal Pay Act was invalid because the statutory authority for the Reorganization Plan's promulgation — the Reorganization Act of 1977, 5 U.S.C. 901 *et seq.* — contained an unconstitutional legislative veto provision, 5 U.S.C. 906. The Commission conceded that the legislative veto provision in the Reorganization Act was unconstitutional in light of this Court's decision in *INS* v. *Chadha,* No. 80-1832 (June 23, 1983). It contended, however, that dismissal of the Commission's enforcement action was improper because the one-House veto provision is severable from the remainder of the Reorganization Act; because the decision in *Chadha* should not be applied retroactively to invalidate reorganization plans that were not vetoed and therefore went into effect prior to the date of the *Chadha* decision; and because Congress in any event had ratified the transfer of authority to the Commission.

By judgment order dated January 5, 1984, the district court granted appellee's motion to dismiss on the ground that the EEOC lacked authority to sue. The court relied

upon and incorporated by reference the decision of the district court in *EEOC* v. *Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), direct appeal pending, No. 83-1021. App., *infra*, 1a-2a.

THIS COURT DOES NOT HAVE JURISDICTION OVER THE APPEAL UNDER 28 U.S.C. 1252

This direct appeal under 28 U.S.C. 1252 has been docketed for protective purposes only, pending the Court's disposition of the Commission's direct appeal in *EEOC* v. *Allstate Insurance Co.*, No. 83-1021, which presents identical questions concerning this Court's jurisdiction under 28 U.S.C. 1252 and the Commission's authority to enforce the Equal Pay Act. In the Jurisdictional Statement in *Allstate* (at 6-8, 17),[2] we argue that the Court does not have jurisdiction over the direct appeal because the Commission does not seek review of the district court's holding that the legislative veto provision of the Reorganization Act is unconstitutional but instead seeks review of other issues. Those other issues are: whether the legislative veto provision is severable from the remainder of the Reorganization Act; whether Congress intended when it passed the Reorganization Act in 1977 that reorganization plans that were not vetoed by one House of Congress should be invalidated if the latent legislative veto authority in the Act subsequently was held unconstitutional; whether this Court's decision in *Chadha* should be applied retroactively to invalidate completed reorganization plans; and whether Congress in any event had ratified the transfer of enforcement authority to the Commission (see J.S. at 8-17, *EEOC* v. *Allstate Insurance Co.*, *supra*). We suggested when we filed the Jurisdictional Statement in *Allstate* (at 8, 17) that the Court hold that Jurisdictional Statement pending the Court's decision

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[2]We are furnishing counsel for appellee with copies of the Jurisdictional Statement, Reply Brief, and Supplemental Memorandum in *Allstate*.

in *Heckler* v. *Edwards*, No. 82-874, which also presented the question whether this Court has jurisdiction under 28 U.S.C. 1252 over an appeal in which the appellant does not seek review of the district court's holding that a provision in an Act of Congress is unconstitutional.

On March 21, 1984, the Court rendered its decision in *Heckler* v. *Edwards*, concluding that a direct appeal does not lie under 28 U.S.C. 1252 "unless the holding of federal statutory unconstitutionality is in issue" (slip op. 5). Because the Commission's appeal in the instant case does not place in issue the district court's holding that the legislative veto provision of the Reorganization Act is unconstitutional, it follows from *Edwards* that the Court does not have jurisdiction over this appeal under 28 U.S.C. 1252. However, because the Court has not yet disposed of the Commission's direct appeal in identical circumstances in *Allstate*, we are docketing this appeal as a protective matter. For the same reason, we recently docketed another direct appeal raising identical questions, pending the Court's disposition of the appeal in *Allstate*. See *EEOC* v. *Martin Industries, Inc.*, direct appeal pending, No. 83-1893 (docketed May 18, 1984).

THE QUESTION IS SUBSTANTIAL

If the Court nevertheless determines that it has jurisdiction over this appeal, we submit, for the reasons stated in our Jurisdictional Statement in *Allstate* (at 8-16), that the district court erred in concluding that the Commission does not have authority to enforce the Equal Pay Act. As we point out in our Jurisdictional Statement (at 6-7 & n.2) in *EEOC* v. *Martin Industries, Inc.*, *supra*, the overwhelming majority of lower courts now have agreed that the holding by the district court in *Allstate* is erroneous and that the

Commission does possess the authority to enforce the Equal Pay Act and the Age Discrimination in Employment Act.[3]

CONCLUSION

The Jurisdictional Statement in this case should be held pending the Court's disposition of the appeal in *EEOC* v. *Allstate Insurance Co.*, No. 83-1021, and then be disposed of in light of the Court's action in *Allstate*.

Respectfully submitted.

REX E. LEE
Solicitor General

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission

MAY 1984

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[3]We are furnishing counsel for appellee with a copy of the Jurisdictional Statement in *Martin Industries*.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
vs.	)	Civil Action
	)	No. 83-1209
WESTINGHOUSE ELECTRIC CORPORATION,	)	
Defendant.	)	

JUDGMENT ORDER

AND NOW, this 5th day of January, 1984, upon consideration of Defendant's Motion to Dismiss filed in the above captioned matter on August 29, 1983; and

Upon further consideration of the United States Supreme Court's decision in *Immigration and Naturalization Service v. Chadha,* — U.S. —, 103 S. Ct. 2764, 77 L.E.2d 317 (1983) (a copy of which is attached hereto and made a part hereof), which states that a one-house veto provision that is legislative in purpose and effect is subject to the procedures set out in Article I of the United States Constitution and that "legislation by the national Congress [must] be a step-by-step, deliberate and deliberative process." (*Id.* at _____, 103 S. Ct. at _____, 77 L.E.2d at 349); and

Upon further consideration of the decision of the United States District Court for the Southern District of Mississippi in *EEOC v. Allstate Insurance Company,* 570 F. Supp. 1224 (1983) (a copy of which is attached hereto and

made a part hereof), which relied upon *Chadha, supra,* in holding that Reorganization Plan 1 of 1978, containing the provision permitting the EEOC to enforce the Equal Pay Act, is unconstitutional because the Reorganization Plan was adopted pursuant to the Reorganization Act of 1977 that contained a one-house veto provision, and, therefore, that the EEOC lacks authority to act as plaintiff in Equal Pay Act cases,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is GRANTED.

/s/ Alan N. Bloch

United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 83-1029
WESTINGHOUSE ELECTRIC CORPORATION,	)	
Defendant.	)	

[filed Jan. 30, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Equal Employment Opportunity Commission, the above-named plaintiff, hereby appeals to the Supreme Court of the United States from the order entered on January 5, 1984, dismissing plaintiff's action.

The appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

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/s/ Alicia G. Burkman

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